91-1409

(1)

Supreme Court, U.S.
FILED
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

GEORGE HERMAN, et al.,

Petitioners,

-vs-

CHARLES W. PAGE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a state prisoner seeking relief under 28 U.S.C. § 2254 return to state court for a state procedural default ruling before a federal court may find that he has procedurally defaulted in state court if the prisoner has had a state appeal and a state post-conviction relief proceeding?

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OPINION BELOW

The district court ordered the § 2254 petition dismissed on the ground of state procedural default. The district court noted that the prisoner had already had a direct appeal and a state post-conviction relief proceeding in state court. The federal habeas corpus petition presented new issues not raised in the state court proceedings. The district court found that Arizona's rules of procedure would not allow the prisoner to obtain review of the claims not previously raised in state court. See Rule 32.2(a)(3), Ariz. R. Crim. P. The district court found that the respondent had not shown cause or prejudice for the procedural default.

The Ninth Circuit Court of Appeals vacated the district court's order and remanded the case holding that because no state court had specifically ruled that the new claims were procedurally defaulted, the federal courts must

dismiss the petition without prejudice because the claims were "unexhausted." The Ninth Circuit's decision is appended as Appendix A.

STATEMENT OF JURISDICTION

The decision of the Ninth Circuit Court of Appeals which the State of Arizona asks this Court to review was filed on August 30, 1991. The Ninth Circuit denied the state's petition for rehearing on November 22, 1991. (Appendix B.) This petition is filed within 90 days from that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. A.§ 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATE PROCEDURAL RULES INVOLVED

Rule 32.2, Arizona Rules of Criminal Procedure, states in part:

> **a. Preclusion.** A petitioner will not be given relief under this rule based upon any ground:
>
> . . . .
>
> (3) Knowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding.
>
> . . . .
>
> **c. Inference of Waiver.** The court may infer from the petitioner's failure to appeal or to raise an issue on appeal after being advised by the sentencing judge of the necessity that he do so, or his failure to raise any ground then available to him in a previous Rule 32 proceeding in which he was represented by counsel, that he knowingly, voluntarily and intentionally relinquished the right to do so.
>
> **d. Standard of Proof.** The prosecutor shall plead and prove any ground of preclusion by a preponderance of the evidence; however, the inference of section (c) shall be considered part of the evidence.

(Emphasis added.)

Rule 32.10, Arizona Rules of Criminal Procedure, states:

> **Waiver.** Any grounds for post-conviction relief which have been

litigated in the proceedings leading to the judgment of conviction shall not be re-litigated in these proceedings. All grounds for relief available to petitioner must be raised by petitioner either in his petition or in the hearing thereon. Any ground not raised will be presumed waived and may not be the basis for subsequent petition unless the court finds there was reasonable ground for omitting the matter in the original petition or hearing. Any matters raised by appeal or other proceedings such as habeas corpus which have been finally disposed of on the merits may not form a basis for relief in this proceeding.

(Emphasis added.)

STATEMENT OF THE CASE

Page was convicted by a jury of three counts of armed robbery with a gun. A.R.S. §§ 13-641 and -643 (Repealed Oct. 1, 1978). The state also alleged and proved a prior conviction for forgery from the State of Washington. The trial court sentenced Page to concurrent terms of 20 to 30 years in prison on Counts I and II, and a consecutive term of 20 to 30 years on Count III. Page appealed his convictions and sentences.

On direct appeal, Page's appellate counsel filed an Anders[1] brief. Page filed a supplemental brief raising various claims. The Arizona Court of Appeals affirmed the convictions and sentences in 1979. (Appendix C.) The Arizona Supreme Court denied Page's petition for review. (Appendix D.)

In 1980, with the assistance of counsel, Page filed a petition for

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1. Anders v. California, 386 U.S. 738 (1967).

post-conviction relief pursuant to Rule 32, Arizona Rules of Criminal Procedure. Following an evidentiary hearing, the trial court denied relief on September 16, 1980. The trial court found that one of the issues was precluded and the other two issues were without merit. (Appendix E.) Page petitioned the Arizona Court of Appeals for review. The intermediate state appellate court denied relief. (Appendix F.) Page did not petition the Arizona Supreme Court for review of the court of appeals decision.

Page then filed a petition for writ of habeas corpus in the district court of Arizona raising the three issues that he had raised in the state post-conviction petition. Page also added three new allegations of ineffectiveness of counsel. The three ineffectiveness claims had never been raised in any state court proceeding. The claims presented

in the district court petition were as follows:

1. Ineffective assistance of trial counsel.

A. Trial counsel failed to adequately investigate the case.

B. Trial counsel failed to advise respondent of a plea agreement offering respondent a ten (10) year prison sentence to settle the matter.

C. Trial counsel failed to call witnesses.

D. Trial counsel failed to plan any strategy.

2. Sentence imposed is excessive.

3. Sentence imposed violates ex post facto clause of the United States Constitution.

The issues raised in the state court post-conviction relief petition were issues 1(C), 2, and 3.

In the Report and Recommendation, the magistrate found that the three additional claims about counsel [1(A), 1(B), and 1(D)] were procedurally defaulted because they had not been raised in state court, and no Arizona

remedy existed for Page to raise them in a return to state court.[2] The state never filed a response on the merits in the district court. The district court issued an order denying relief on procedural grounds on June 29, 1990. (Appendix G.)

Page appealed the dismissal to the Ninth Circuit Court of Appeals. That court ordered that the petition should be dismissed without prejudice because the petition contained unexhausted claims. The court invited Page to return to state court and file a second post-conviction

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2. The magistrate further found that although Page had not taken the remaining three claims in his petition to the state's highest court, the fact that the lower appellate court did not deny relief on the ground of procedural default meant that the federal court could reach the merits of the petition on these three claims. The state filed an objection to the magistrate's order arguing that the failure to take the three exhausted claims to the state's highest court was in fact a procedural default sufficient to prevent the federal courts from reaching the merits of the claims.

petition, 12 years after his first one, to exhaust all of the claims.

REASONS FOR GRANTING THE WRIT

The basic questions presented in this petition are (1) is a state entitled to finality or must it be subjected to a constant barrage of attacks seeking "procedural" findings, and (2) when may a federal court find further state action is futile. Before a federal district court may consider a state prisoner's application for relief under 28 U.S.C. § 2254, the prisoner must have exhausted, in the state court, every claim raised in the petition. Coleman v. Thompson, 501 U.S. ___, 111 S. Ct. 2546, 2554-55, 115 L. Ed. 2d 640 (1990); Castille v. Peoples, 489 U.S. 346 (1989); Rose v. Lundy, 455 U.S. 509 (1982). To exhaust state remedies, the prisoner must have afforded the state's highest court the opportunity to rule upon the merits of his federal constitutional claim by

"fairly presenting" the claim to the state's highest court in a procedurally appropriate manner. Castille v. Peoples, 489 U.S. at 351. Once a prisoner has afforded the state's highest court an opportunity to rule upon the merits of the alleged federal constitutional violation, the prisoner has complied with the exhaustion doctrine and the federal district court may review the claim on the merits. The determination of what procedures must be utilized in presenting federal constitutional claims in state court is, of course, purely an issue of state law and procedure. See Coleman v. Thompson, 111 S. Ct. at 2553-54.

In Arizona, the Arizona Supreme Court has stated that state prisoners attacking the constitutionality of their convictions or sentences must do so either in the direct appeal or in a petition for post-conviction relief. See Rules 31 and 32, Ariz. R. Crim. P.; State

v. Sandon, 161 Ariz. 157, 777 P.2d 220 (1989). In Sandon, the Arizona Supreme Court set forth its frustration in dealing with the federal court's "exhaustion" requirement. 161 Ariz. at 158, 777 P.2d at 221. The court noted that ordinarily they would dispose of such matters as Sandon by order, but because the Arizona Supreme Court continued to receive "large numbers of prisoner petitions seeking to exhaust state remedies" the court addressed the propriety of sending such cases back to the state court for a procedural order. 161 Ariz. at 157, 777 P.2d at 220. The court noted that Sandon and his codefendant were convicted of various offenses in Arizona. Sandon and his cohorts attacked their convictions and sentence by way of direct appeal and through post-conviction relief proceedings. 161 Ariz. at 157, 777 P.2d at 220. The court of appeals reviewed

various issues raised in the consolidated cases and affirmed the convictions and sentence by way of a memorandum decision. Id. Counsel for Sandon filed a petition for review to the Arizona Supreme Court selecting three of the various issues he believed to merit consideration on review. Id. The Arizona Supreme Court denied the petition for review. Id.

Sandon then sought habeas corpus relief in the federal district court of Arizona pursuant to 28 U.S.C. § 2254. The federal district court determined that Sandon had not exhausted his state court remedies on the various issues not presented to the Arizona Supreme Court in his petition for review. In light of this failure to present all of the claims raised in the federal district court in state court, the district court dismissed without prejudice so Sandon could return to attempt to exhaust his claims. State

v. Sandon, 161 Ariz. at 158, 777 P.2d at 221.

The Arizona Supreme Court noted that in Arizona every criminal defendant is entitled to an appeal as of right. Ariz. Const. art. II, § 24. The Arizona Supreme Court also noted that any person who has been convicted of or sentenced for a criminal offense in the State of Arizona may institute a post-conviction relief proceeding pursuant to Rule 32, Arizona Rules of Criminal Procedure. 161 Ariz. at 158, 777 P.2d at 221. The court noted that once a criminal defendant had availed itself of a direct appeal and a post-conviction relief proceeding, "the case in the Arizona courts is over." 161 Ariz. at 158, 777 P.2d at 221. The court noted that substantive review in the State of Arizona at that point in time was limited to the very specific allegations contained in Rule 32.1(d), (e), or (g),

of the Arizona Rules of Criminal Procedure, and absent those specific allegations no further relief was available in the State of Arizona. 161 Ariz. at 158, 777 P.2d at 221.[3] It was the goal of the Arizona Supreme Court to end the incessant barrage of petitions being directed from the district court to the Arizona courts to determine if there were in fact remedies still available in state court. 161 Ariz. at 157, 777 P.2d at 220.

Where state law precludes a state prisoner from obtaining state court review of a particular claim, the

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3. Rule 32.1(d), (e), and (g) provide exceptions to the preclusion rules on subsequent petitions for post-conviction relief. Those exceptions are limited to a defendant who is being held in custody after his sentence has expired, newly-discovered material facts exist that the defendant could not have discovered and produced earlier, and a significant change in the law that if applied retroactively would entitle the defendant to relief.

prisoner is not required to return to state court, because a return to the state court would be "futile." Coleman v. Thompson, 111 S. Ct. at 2555; Castille v. Peoples, 489 U.S. at 351-52. In such situations state remedies are "exhausted" because the prisoner has procedurally defaulted, and, as a prerequisite to obtaining federal review, must demonstrate "cause" and "actual prejudice." Coleman v. Thompson, 111 S. Ct. at 2565; Teague v. Lane, 489 U.S. 288, 298 (1989). In spite of the clear language in Sandon the Ninth Circuit, relying on Johnson v. Lewis, 929 F.2d 460, 463 (9th Cir. 1991), stated that the language in Arizona's procedure rule which allows an inference of waiver from a failure to raise claims in a previous proceeding was a permissive, not mandatory, waiver. (Appendix A at 3.) The Ninth Circuit's language is baffling in light of the plain wording of Arizona

Rule 32.2. First, the inference of waiver is not merely "permissive," it states "shall be considered part of the evidence." Rule 32.2(d), Ariz. R. Crim. P. (emphasis added). Likewise the Arizona Supreme Court has specifically held that a state prisoner is precluded from urging new claims of alleged ineffective assistance of counsel in a second post-conviction relief petition. State v. Conner, 163 Ariz. 97, 100, 786 P.2d 948, 951 (1990). Thus, the inference of waiver is not "permissive," it is mandatory. And the preclusion is overcome by the petitioner only if he fits within the narrow exceptions contained in Rule 32.1(d), (e), or (g). State v. Sandon, 161 Ariz. at 158, 777 P.2d at 221. The failure to bring a claim within a recognized exception to the preclusion holding of the rule, precludes a state court from reviewing the merits of the claim in a subsequent

petition for post-conviction relief. State v. Sandon.[4]

Federal courts are bound by the interpretation a state gives to its laws and procedures. See Estelle v. McGuire, ___ U.S. ___, 112 S. Ct. 475, ___ L. Ed. 2d ___ (1991). It is clear that the Arizona Supreme Court considers Rule 32.2(c) and (d), Arizona Rules of Criminal Procedure, as a mandatory inference of waiver if the claim is not brought in the first petition for post-conviction relief.[5]

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4. Arizona's waiver doctrine has received renewed emphasis in light of a recent decision in State v. Slemmer, 102 Ariz. Adv. Rep. 11 (Dec. 19, 1991). In Slemmer, the Arizona Supreme Court held a claim that would be fundamental harmful error in a jury instruction could not be raised for the first time in a Rule 32 proceeding if it did not fit within one of the recognized exceptions.

5. The Ninth Circuit panel decision in Johnson v. Lewis, clearly misconstrued existing Arizona law and is analytically flawed. Moreover, even if Johnson is correctly decided, it is distinguishable from this case. In Johnson, the
(Continued on next page)

Moreover, the Arizona Supreme Court has stated its refusal to entertain petitions filed by state prisoners seeking to "exhaust state court remedies" years after the prisoners have failed to comply with applicable state court procedures. State v. Sandon. The Arizona Supreme Court has made it abundantly clear that it has no intention of entertaining such late petitions in the future and that state remedies have been "exhausted." Id. See also State v. Shattuck, 140 Ariz. 582, 585, 684 P.2d 154, 157 (1984) (once the defendant has been given the appeal to which he has a right "state remedies have been exhausted"). These cases abundantly show the Arizona Supreme Court's desire to avoid unending litigation by enforcing state procedural

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(Footnote 5 cont'd.)
petitioner had never pursued post-conviction relief in the state trial court. 929 F.2d at 464. Here, Page pursued post-conviction relief in state court and is being told to do so again.

rules. In spite of this clear language from the Arizona Supreme Court, the Ninth Circuit ordered Page to clog up the Arizona court system by attempting to litigate his exhaustion issue in front of the Arizona state courts. Such a holding clearly violates the comity requirement of federal habeas corpus review of state court convictions.

Other circuits likewise hold as the Ninth Circuit does that futility does not matter. Carillo v. Brown, 807 F.2d 1094, 1101 (1st Cir. 1986) (finding a "glimmer of hope" for the petitioner's future successive state petition in state post-conviction statute where it mentions the "interest of justice"); Rodriguez v. Hoke, 928 F.2d 534, 537 (2d Cir. 1991) (new allegations of ineffective counsel sent back to the state court). Other circuits have read state procedural rules and case law at face value. Sotelo v. Indiana State Prison, 850 F.2d 1244, 1252

(7th Cir. 1988) (federal claim waived where it had not been raised in state appeal and such issues "are generally considered waived for the purposes of the Indiana post-conviction remedy"). The Ninth Circuit Court of Appeals is sending Page back to the state court so that Page can have a state court tell him that his three new ineffective assistance allegations are precluded. Page then gets to come back into the federal district court to have the district court tell him that he has procedurally defaulted and that there is no cause or prejudice for this procedural default. Precisely the ruling he originally received by the district court of Arizona.[6] After taking up a

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6. The District Court for the District of Arizona sees these cases of procedural default over and over again. The district court does not need a state court ruling to recognize that in fact the state prisoner has "exhausted" his available state court remedies in
(Continued on next page.)

considerable amount of time in the state court and federal district court Page will then return to the Ninth Circuit to have them rule on the very issue that they could decide now, whether or not Page has shown cause and prejudice for his procedural default.

This Court recently said in Coleman v. Thompson, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991):

> We now recognize the important interest in finality served by the state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.

111 S. Ct at 2565, 115 L. Ed. 2d at 659. The case before the Court today is another example of the federal courts ignoring a state court's procedural rules and the clear mandate from the state

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(Footnote 6 cont'd.)
Arizona. A federal court should presume that the state courts are going to follow their own rules. See Ylst v. Nunnemaker, 501 U.S. ___, 111 S. Ct. 2590, 2594-95, 115 L. Ed. 2d 706 (1991); Castille v. Peoples, 489 U.S. at 351.

court. There is no new state procedure for Page to employ to raise new issues at this late stage in the proceeding. The Ninth Circuit Court of Appeals is simply encouraging Page to return to a state system to have the state court tell him that "the case in the Arizona courts is over." State v. Sandon, 161 Ariz. at 158, 777 P.2d at 221. Contrary to what Coleman teaches, the Ninth Circuit wants the state courts to say the particular magic words before the federal courts hold that state procedures were violated. The district court was correct to call a halt to the endless returns to the state court every time a prisoner thinks up a new issue. Under the reasoning of the Ninth Circuit, there never will be an end to the state-federal ping-pong game that allows a case like this that is over a decade old to continue to clog up both the state and federal systems.

The rules recently established by the Ninth Circuit are impossible to follow in the area of habeas corpus for state respondents. The Ninth Circuit has held that a state respondent may not argue that a federal petitioner has failed to exhaust his state remedies if the state later expects to argue procedural default in the state court. Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 2915 (1991). In the instant case, the state complied with Russell v. Rolfs and argued that the defendant was in procedural default because if he returned to state court the state would argue procedural default. The Ninth Circuit now has held that this is also in error. The State of Arizona is now in a Hobson dilemma. If the state believes that the petitioner has failed to exhaust state court remedies, the state may not file a motion to dismiss if the state intends to

seek a procedural bar upon the return to the state court under Russell v. Rolfs. However, the state may not argue procedural default under Page and Johnson because the Ninth Circuit does not believe in the futility doctrine. With this petition, the state seeks a way out of the maize presented by these inconsistent rulings.

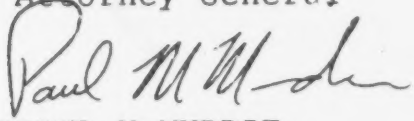
CONCLUSION

This Court should grant the petition and hold that when state court procedural rules presume a procedural bar, the federal courts will not mandate that the defendant return to the state systems. Such a holding is required under this Court's recognition of comity and finality as envisioned in Coleman v. Thompson.

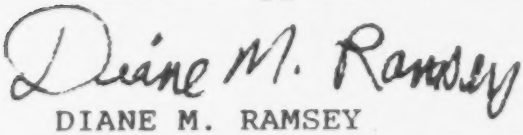
DATED this day of February, 1992.

Respectfully submitted,

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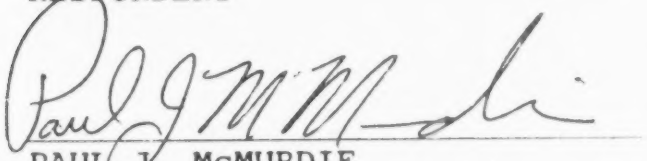
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THREE COPIES of this Brief were deposited for mailing this 13TH day of February, 1992, to:

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CRM90-0039

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APPENDIX A

[FILED Aug. 30, 1991]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES W. PAGE,	No. 91-15406
Petitioner/Appellant,	D.C. No. CV-89-01584-CLH
GEORGE HERMAN, Warden; ATTORNEY GENERAL OF THE STATE OF ARIZONA,	MEMORANDUM*
Respondents-Appellees	

Appeal from the United States District Court
for the District of Arizona
Charles L. Hardy, District Judge, Presiding

Submitted August 23, 1991**

Before: BROWNING, SNEED, and NORRIS Circuit Judges.

Charles W. Page, an Arizona state prisoner, appeals pro se the district court's denial of his Fed. R. Civ. P. 60(b) motion to vacate the judgment in his 28

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

U.S.C. § 2254 petition for habeas corpus. We review for an abuse of discretion, Molloy v. Wilson, 878 F. 2d 313, 315 (9th Cir. 1989), and we vacate and remand with instructions to dismiss the petition without prejudice for failure to exhaust state remedies.

A state prisoner must exhaust all available state court remedies either on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. 28 U.S.C. § 2254; Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam); Lindquist v. Gardner, 770 F.2d 876, 877 (9th Cir. 1985). A prisoner satisfies the exhaustion requirement by presenting all claims to the highest state court with jurisdiction to consider the claims. Picard v. Connor, 404 U.S. 270, 276 (1971). If a habeas petition contains unexhausted claims, the district court must dismiss a petition filed pursuant to section 2254. Rose v. Lundy, 455 U.S. 509, 510 (1982).

In his federal petition, Page raises six issues. Three of the issues were never raised in state court. The district court determined that Page was procedurally barred from bringing these claims, presumably because he had filed a Rule 32 petition with the assistance of counsel. See Ariz. R. Crim. P. 32.2(a)(3) & (c). Nevertheless, the language of Rule 32.2(c), which allows an inference of waiver from a failure to raise claims in a previous proceeding, is permissible, not mandatory. See Johnson v. Lewis, 929 F.2d 460, 463 (9th Cir. 1991). Moreover, no Arizona court has concluded that Page is procedurally barred from raising these claims. See Id.; cf. Tacho v. Martinez, 862 F.2d 1376, 1378 (9th Cir. 1988) (state trial court denied Rule 32 petition because petitioner failed to raise claim on direct appeal or in two previous Rule 32 petitions; this court held that petitioner was procedurally barred from raising his claims). Thus, Page may not

have exhausted available state remedies. 28 U.S.C. § 2254; see Duckworth, 454 U.S. at 3; Johnson, 929 F.2d at 464. Accordingly, his federal petition contains unexhausted claims, and the district court should have dismissed the entire petition without prejudice. Rose, 455 U.S. at 510 (1982); Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir. 1988).

VACATED and REMANDED with instructions to dismiss the petition without prejudice.

APPENDIX B

[Filed Nov. 22, 1991]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES W. PAGE,	)	No. 91-15406
	)	
Petitioner-Appellant,	)	D.C. No.
	)	CV-89-01584-CLH
GEORGE HERMAN, Warden;	)	
ATTORNEY GENERAL OF THE STATE OF ARIZONA,	)	O R D E R
	)	
Respondents-Appellees.	)	
	)	

Before: BROWNING, SNEED, and NORRIS Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Browning and Norris have voted to reject the suggestion for a rehearing en banc, and Judge Sneed has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED**, and the suggestion for a rehearing en banc is **REJECTED**.

APPENDIX C

[Filed Apr. 12, 1979]

IN THE
Court of Appeals
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 3700
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	
CHARLES WALTER PAGE,	)	[Not for publication --
	)	Rule 48, Rules of the
Appellant.	)	Arizona Supreme Court]
	)	
	)	

Appeal from the Superior Court of
Maricopa County

Cause No. CR-102073

The Honorable James Moeller, Judge

AFFIRMED

John A. LaSota, Jr., Phoenix
former Attorney General
by William J. Schafer III
Chief Counsel, Criminal Division
Attorneys for Appellee

Ross P. Lee, Maricopa County Phoenix
Public Defender
by Joel M. Glynn, Deputy Public
Defender
Attorneys for Appellant

J A C O B S O N, Judge

By indictment filed May 9, 1978, the appellant, Charles W. Page, was charged with three counts of robbery with a gun in violation of A.R.S. §§ 13-641 and 13-643(B). On July 14, 1978, the indictment was amended by adding an allegation of prior conviction. A jury found appellant guilty on August 30, 1978. Appellant admitted to the prior conviction while testifying on his own behalf. On September 28, 1978, the trial court entered judgments of guilt and sentenced appellant to serve a prison term of not less than 20 nor more than 30 years on count one, to serve a concurrent term of 20 to 30 years on count two, and to serve a sentence of not less than 20 nor more than 30 years on count three, this last to be consecutive to the sentences imposed on counts one and two. From these judgments and sentences, the present appeal is taken.

Counsel for appellant has filed a brief in accordance with Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493

(1967) and has requested this court to search the record for fundamental error pursuant to A.R.S. § 13-4035 and State v. Powell, 5 Ariz. App. 51, 423 P.2d 127 (1967). Counsel for appellant has not presented any points of arguable error.

Appellant Page has been advised by this court that he was permitted to file a supplemental brief in propria persona. Appellant Page has filed a document with this court raising two issues. First, he claims that although charged with three counts of armed robbery, he was only arraigned on two. The minute entries, however, reflect his arraignment on all three charges. Second, he attacks the photographic line-up viewed by the robbery victims. We have examined the photographs comprising the line-up and find nothing unduly suggestive or otherwise improper about them.

The court has reviewed and considered memoranda filed by appointed counsel and has

independently reviewed the entire record for fundamental error as required by A.R.S. § 13-1715[1/] and has found none.

Judgments and sentence affirmed.

/s/
Eino M. Jacobson, Judge

CONCURRING:

/s/
Mary M. Schroeder
Presiding Judge

/s/
Jack L. Ogg, Chief Judge
Division 1.

1/ Renumbered in the new Criminal Code as A.R.S. § 13-4035

APPENDIX D

CLIFFORD M. WARD
CLERK

MARY ANN HOPKINS
CHIEF DEPUTY CLERK

Supreme Court
STATE OF ARIZONA
Phoenix
85007

June 12, 1979

STATE OF ARIZONA,	)	Supreme Court
	)	No. 4661-PR
Appellee,	)	
	)	
vs.	)	Court of Appeals
	)	No. 1 CA-CR 3700
CHARLES WALTER PAGE,	)	
	)	Maricopa County
Appellant.	)	No. CR-102073
	)	

The following action was taken by the Supreme Court of the State of Arizona on June 12, 1979 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 12th day of June, 1979.

CLIFFORD M. WARD, Clerk
By /s/
Deputy Clerk

TO: Ross P. Lee, Maricopa County Public Defender, 114 West Adams Street, Phoenix, Arizona 85003 Attn: Joel M. Glynn

Hon. Robert K. Corbin, Attorney General, 200 State Capitol Building, Phoenix, Arizona 85007 Attn: William J. Schafer III

Charles F. Hyder, Maricopa County Attorney, 101 West Jefferson Street Phoenix, Arizona 85003

Hon. James Moeller, Judge, Maricopa County Superior Court, 201 West Jefferson Street, Phoenix, Arizona 85003

Glen D. Clark, Clerk, Court of Appeals, Division One, West Wing, State Capitol Building, Phoenix, Arizona 85007

Charles Walter Page, Arizona State Prison, Box B-38815, Florence, Arizona 85232

APPENDIX E

IN THE SUPERIOR COURT
OF
MARICOPA COUNTY, STATE OF ARIZONA

28-H	Sept. 16, 1980	HON. WILLIAM F. FRENCH
DIV.	DATE	JUDGE OR COMMISSIONER

WILSON D. PALMER Clerk
Renee Cornell Deputy

R-102073

STATE OF ARIZONA	Attorney General By: David R. Cole
vs	
CHARLES W. PAGE	Stephen L. Parker

The Court having reviewed the pleadings, record, transcripts and having evaluated the evidence presented finds the following:

(1) A more than adequate investigation prior to trial was conducted by defendant's counsel with the assistance of two investigators;

(2) Defense counsel's decision not to have a Dessureault Hearing was a tactical one as was the decision not to file a motion to sever counts;

(3) Defense counsel's decision not to call alleged "alibi witnesses" was also a

IN THE SUPERIOR COURT
OF
MARICOPA COUNTY, STATE OF ARIZONA

28-H DIV. | Sept. 16, 1980 DATE | HON. WILLIAM P. FRENCH JUDGE OR COMMISSIONER

WILSON D. PALMER Clerk
Renee Cornell Deputy

R-102073 STATE vs PAGE (Continued)

tactical one and the investigators could establish no "alibi witness" that would have been beneficial to the defendant;

(4) Defense counsel's failure to move to suppress evidence would have been an exercise in futility as the evidentiary matters were patently admissable;

(5) In preparing for trial, defense counsel conferred with victims, defendant, witnesses, county attorney and thoroughly reviewed all evidence against the defendant and explored thoroughly the possibility of a plea agreement;

(6) The Court concludes, as a matter of law, that the defendant received competent representation;

IN THE SUPERIOR COURT
OF
MARICOPA COUNTY, STATE OF ARIZONA

28-H DIV. | Sept. 16, 1980 DATE | HON. WILLIAM P. FRENCH JUDGE OR COMMISSIONER

WILSON D. PALMER Clerk
Renee Cornell Deputy

R-102073 STATE vs PAGE (Continued)

(7) The recomputations of release dates resulting from a change of the Dept. of Corrections policy were not violative of the ex-post facto clause;

(8) The issue of excessive sentence is waived by failure to raise on appeal.

From the findings and conclusions above,

IT IS ORDERED that the Petition for Post-Conviction Relief is denied.

APPENDIX F

[FILED June 16, 1981]

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Respondent, vs. CHARLES WALTER PAGE, Petitioner.	1 CA-CR 5020-PR DEPARTMENT A MEMORANDUM DECISION (Not for Publication - Rule 48, Rules of the Arizona Supreme Court)

Petition for Review of Action of the
Superior Court of Maricopa County

(Rule 32.9(c), Rules of Criminal
Procedure, 17 A.R.S.)

Cause No. CR-102073

The Honorable William P. French, Judge

REVIEW GRANTED; RELIEF DENIED

THOMAS E. COLLINS, Maricopa County Attorney
By Lyn Kane
Deputy County Attorney
Attorneys for Respondent — Phoenix

ROBERT K. CORBIN, Attorney General
By William J. Schafer III
Chief Counsel, Criminal Division
and
David R. Cole
Assistant Attorney General
Attorneys for Respondent — Phoenix

STEVEN L. PARKER
Attorney for Petitioner Phoenix

G O T T S F I E L D, Judge

Petitioner was charged by indictment with three counts of armed robbery with a gun in violation of A.R.S. §§ 13-641 and -643(B).[1] The offenses occurred in April of 1978. An allegation of a prior conviction was filed, based on petitioner's prior offense and conviction in 1977 of forgery in the State of Washington. Petitioner was found guilty by a jury of all three counts. Following entry of judgment of guilt, he was sentenced to concurrent terms of twenty to thirty years' imprisonment on counts one and two and a term of twenty to thirty years on count three, to run consecutive to the sentences imposed on counts one and two. An appeal was filed with this court in compliance with Anders v. California, 386 U.S. 738 (1967) and the

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[1] Statutory references, unless otherwise indicated, are to designations prior to the effective date of the revised criminal code, October 1, 1978.

convictions and sentences were affirmed. State v. Page, 1 CA-CR 3700 (filed April 12, 1979).

Petitioner began these proceedings by filing a petition for post-conviction relief with the trial court pursuant to Rule 32, Arizona Rules of Criminal Procedure, 17 A.R.S. He received appointed counsel, who filed additional pleadings. After all pleadings were filed, an informal conference was held and the trial court determined that an evidentiary hearing was required. Rule 32.7; Rule 32.8. Following a full evidentiary hearing which occurred over the course of two separate days, the petition was denied. A subsequent timely motion for rehearing was likewise denied, and the matter is before this court upon the filing of a timely petition for review. Rule 32.9(c). We

proceed to review only those issues preserved in the motion for rehearing.[2]

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner first alleges he received ineffective assistance of counsel at trial for several reasons. In reviewing this claim, the rule in Arizona is that a conviction will not be set aside unless the representation by defendant's lawyer was so ineffective that the proceedings were reduced to a farce, sham or mockery of justice. State v. Williams, 122 Ariz. 146, 593 P.2d 896 (1979). In a proceeding under Rule 32, the petitioner has the burden of proving any allegations of fact by a preponderance of the evidence. Rule 32.8 c ; State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979)\ Thus, the petitioner must present allegations which demonstrate actual

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[2] Rule 32.9(a); State v. Ramirez, 126 Ariz. 464, 616 P.2d 924 (App. 1980); State v. Moore, 125 Ariz. 528, 611 P.2d 115 (App. 1980); State v. McFord, 125 Ariz. 377, 609 P.2d 1077 (App. 1980).

incompetency of counsel as reflected in the manner of carrying out his duties as trial counsel, and demonstrate substantial prejudice resulting therefrom without which the outcome of the case would probably have been different. State v. Rogers, 113 Ariz. 6, 545 P.2d 930 (1976). As to tactical decisions, control over strategy generally rests with defendant's counsel. State v. Rodriguez, 126 Ariz. 28, 612 P.2d 484 (1980). Tactical errors do not constitute inadequate representation per se, nor can effective representation be equated with successful representation. State v. Dippre, 121 Ariz. 596, 592 P.2d 1252 (1979). Guided by these principles, we conclude petitioner did not receive ineffective assistance of counsel.

Petitioner first argues counsel was ineffective because counsel did not file a request for a pre-trial hearing to challenge the identification testimony of the victims of the armed robberies. See State v. Dessureault, 104 Ariz. 380, 453 P.2d 951

(1969). The record shows, however, that failure to do so was a knowing tactical decision on the part of defense counsel. He testified the victims' prior identifications had been somewhat tentative, and he did not wish to request such a hearing, fearing it would only serve to bolster their identifications. We will not second-guess this decision in the harsh light of hindsight. State v. Salazar, 122 Ariz 404, 595 P.2d 196 (App. 1979).

Petitioner next complains trial counsel did not request severance of robberies which occurred on two separate dates. Trial counsel conceded he felt the robberies were severable; however, he made a deliberate choice not to request a severance. He felt the evidence against his client was overwhelming, and the trial of these cases together would more likely result in concurrent sentences than if the cases were tried separately. Counsel's experience over several years with Maricopa County judges had led him to conclude separate

trials would more likely result in consecutive sentences. Again, we cannot fault him for this decision.

Petitioner also contends his counsel erred in failing to call petitioner's girlfriend to testify as an alibi witness. Again, this was a deliberate choice by defense counsel made after full knowledge of the potential witness's testimony. Counsel testified he feared the girlfriend could be impeached by use of false statements she had made to the police at the time of petitioner's arrest in her trailer. We will not second-guess counsel for failing to call such a witness. State v. Workman, 123 Ariz. 501, 600 P.2d 1133 (App. 1979); State v. Duffy, 124 Ariz. 267, 603 P.2d 538 (App. 1979).

Petitioner furthermore complains trial counsel did not move to suppress the prior conviction. Again, trial counsel made a deliberate choice not to make such a motion. He believed it would be frivolous as the prior conviction was clearly admissible for

impeachment purposes. The prior conviction had occurred the year before the instant offenses and was for forgery, a crime of moral turpitude. We find no error.

Finally, it is contended trial counsel was ineffective for failure to move to suppress evidence regarding bootprints at the scene of the crime, and that petitioner was wearing boots which would make similar prints at the time of his arrest. Again, counsel made a deliberate choice to not make such a motion. He believed such evidence was "minor" because many items belonging to the victims were found in petitioner's possession at the time of his arrest. Also, such evidence was clearly admissible. See State v. Wynn, 114 Ariz. 561, 562 P.2d 734 (App. 1977). Trial counsel has no obligation to make such a pointless motion to suppress evidence which is patently admissible. See State v. Austin, 124 Ariz. 231, 603 P.2d 502 (1979). We also note trial counsel's competence is not measured by the number of pretrial motions filed. See State

v. Ellis, 117 Ariz. 329, 572 P.2d 791 (1977). Petitioner's claim of ineffective assistance of counsel is without merit.

EXCESSIVE SENTENCE

Petitioner next contends his concurrent sentences of twenty to thirty years' imprisonment and consecutive sentence of twenty to thirty years' imprisonment were excessive. This court has previously affirmed these sentences on direct appeal. We have a serious question whether this claim is cognizable under the grounds for relief specified in Rule 32.1. It is admittedly within the range proscribed by statute and there is no allegation the statutory scheme is unconstitutional.

Since the sentences were within the range permitted by statute, petitioner must show an abuse of discretion in the sentence actually imposed. State v. Patton, 120 Ariz. 386, 586 P.2d 635 (1978). Petitioner's record shows numerous prior arrests and convictions, both as a juvenile and as an adult. At the time of

this offense, he was a fugitive from a halfway house in Yakima, Washington. Shortly after he arrived in this state, he used a deadly weapon to rob three different people on two separate occasions. Under these circumstances, we see no abuse of discretion in the sentence imposed. State v. Patton, supra. Petitioner's contention his sentences were excessive is without merit.

EX POST FACTO VIOLATIONS

Petitioner finally alleges that recomputation of his release dates violated the ex post facto clauses of the Arizona and United States Constitutions. His pleadings allege that on November 8, 1978, the Arizona Department of Corrections computed petitioner's mandatory release date and maximum release date as July 2, 2003 and January 2, 2004, respectively, whereas on January 7, 1980, the same computation led to dates of October 2, 2003 and April 2, 2004, respectively. This four-month extension is alleged to have violated the ex post facto clauses.

Initally we note petitioner has not stated the reason for such a recomputation. It is not alleged to be a result of misconduct on his part, or due to a new procedure, rule or legislation. Therefore, petitioner has failed to state a "colorable" claim--that is, one which has the appearance of validity. See State v. Suarez, 23 Ariz. App. 45, 530 P.2d 402 (1975). Additionally, no evidence whatsoever that the recomputation in fact occurred, or any reason for any such recomputation, was ever presented at the hearing. Petitioner has therefore not sustained his burden of proving his allegations of fact by a preponderance of the evidence. Rule 32.8(c); State v. Watson, supra.

The trial court's conclusion that petitioner was not entitled to any relief was fully warranted and its denial of the Rule 32 petition was therefore correct.

Review granted; relief denied.

/s/
ROBERT L. GOTTSFIELD, Judge

CONCURRING:

/s/
JOE W. CONTRERAS
Presiding Judge
DEPARTMENT A

/s/
JACK L. OGG, Judge

NOTE: The Honorable Robert L. Gottsfield was authorized to participate in this case by the Chief Justice of the Arizona Supreme Court pursuant to Ariz. Const. art. VI, § 3.

APPENDIX G

[Filed June 29, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CHARLES PAGE,	)	DATE June 27, 1990
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV 89-1584 PHX CLH
	)	
GEORGE HERMAN, et al.,	)	
	)	
Defendant.	)	
	)	

The Court having considered the petition for writ of habeas corpus, the respondents' motion to dismiss, the petitioner's response thereto and the magistrate's order and recommendation,

IT IS ORDERED granting the motion to dismiss for the reasons stated in the magistrate's report and recommendation.

/s/
CHARLES L. HARDY
United States District Judge

cc: all counsel of record